In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1668

JAMES T. SHIOSAKI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (I-R. 13-23)[1] are unofficially reported at 30 T.C.M. 110. The opinion of the court of appeals (Pet. App. A, 12-13) is reported at 475 F. 2d 770.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1973. The petition for a writ of certiorari was filed on June 11, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "I-R." and "II-R." references are to the record filed in the court of appeals.

QUESTION PRESENTED

Whether the court of appeals correctly affirmed, as not clearly erroneous, the Tax Court's finding that petitioner's gambling activities were undertaken primarily for recreation and not for profit.

STATUTES INVOLVED

The pertinent provisions of 26 U.S.C. 162, 165, 212, and 262 are set forth at Pet. App. B, 14-15.

STATEMENT

Petitioner is an electrical engineer and has been regularly employed in that capacity since 1957. Since 1960, his annual salary has averaged approximately $15,000.

Petitioner went to Las Vegas, Nevada in 1957 for recreation, and while there he was introduced to the gambling game of craps (I-R. 14). Commencing in 1959, petitioner went to Las Vegas several times each year and engaged in gambling—principally at the craps table. In 1959, petitioner was quite successful, aggregating net winnings of $6,426. His fortunes declined, however, and during each of the years 1960 through 1969 he suffered net losses; petitioner's total losses for those years approximated $50,000 (I-R.14-15).

During 1967, the year in controversy, petitioner made 12 trips to Las Vegas for the purpose of gambling. His gross winnings were $1,300 and his gross losses were about $8,000. Petitioner also incurred expenses totalling $1,230.51 for transportation, lodging, meals, etc., in connection with these trips (I-R.16).

On his federal income tax return for 1967, petitioner reported gambling winnings of $1,300 and gambling

losses of the same amount.[2] Petitioner also claimed a deduction of $1,230.51 as "expenses incurred in obtaining gambling income" (I-R. 17). In a notice of deficiency, the Commissioner disallowed this deduction on the ground that the expenses were not incurred for the purpose of producing income but rather were personal expenditures and thus nondeductible under Section 262 of the Internal Revenue Code of 1954. The Tax Court sustained the Commissioner's determination and the court of appeals affirmed the Tax Court's finding as not clearly erroneous.

ARGUMENT

1. Section 212(1) of the Internal Revenue Code of 1954, 26 U.S.C. 212(1), allows individuals to deduct ordinary and necessary expenses incurred for the production of income. This provision permits the deduction of certain profit-motivated expenses even when the income-producing activity does not constitute the taxpayer's trade or business. However, Section 212(1) is limited by Section 262 of the Code, which prohibits the deduction of personal expenses, such as normal recreational and entertainment expenditures. As this Court emphasized in *Lykes* v. *United States,* 343 U.S. 118, 122, the addition of the statutory predecessor of Section 212 did not "authorize widespread deductibility of personal, living or family expenditures."

An expense is incurred "for the production or collection of income," within the meaning of Section 212(1), only when the taxpayer can demonstrate that the alleged income-producing activity is being engaged in for the purpose of making a profit. *Carkhuff* v. *Commissioner,*

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[2] Section 165(d) of the Internal Revenue Code of 1954 provides that losses from wagering transactions shall be allowed only to the extent of gains from such transactions.

425 F. 2d 1400 (C.A. 6); *Bessenyey* v. *Commissioner*, 379 F. 2d 252 (C.A. 2), certiorari denied, 389 U.S. 931. Whether an activity is profit-motivated is a factual question to be determined from all the circumstances of the cases; consideration is to be given, *inter alia*, to the history of gain or loss and to the principal occupation of the individual. See 26 C.F.R. 1.212-1(c).

Both prior and subsequent to the year in issue, petitioner consistently incurred net losses from his gambling (I-R. 15). He testified that he was aware that only a very small percentage of gamblers were successful at craps (II-R. 32-33) and that he had a tendency to use unsuccessful methods of betting (II-R. 34-35). Moreover, there was no connection between petitioner's gambling trips and his principal occupation; to the contrary, his trips served the purpose of relaxation and recreation (II-R. 33-34). In short, there was ample evidence here to support the Tax Court's finding that petitioner's gambling was not profit-motivated and this factual issue warrants no further review.

2. Petitioner relies (Pet. 5-10) upon several decisions in which deductions were allowed under Section 212(1) or a predecessor provision. But those cases all involved facts supporting the existence of a profit motive. By contrast, petitioner's gambling activities were primarily recreational. His expenses in traveling to Las Vegas should be treated no more favorably for tax purposes than the expenses of other taxpayers who travel for recreation.[3]

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[3] Petitioner suggests (Pet. 2, 10) that the disallowance of his claimed deductions constitutes a denial of due process, presumably on the theory that he is being deprived of a legitimate business expense deduction merely because his business is gambling. But there is no factual basis for such an argument: petitioner gambles not for profit but for fun, and his related expenses are treated in the same manner as the non-business recreational expenses of other taxpayers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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